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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. ~~164~~ 12

HY GOLDBAUM, GEORGE CAPRI, and EDWARD COOKE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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To the Honorable Fred M. Vinson, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioners, Hy Goldbaum, George Capri and Edward Cooke, pray that a writ of certiorari issue to review the judgment of the United States Court

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of Appeals for the Ninth Circuit, affirming petitioners' convictions of income tax evasion, the making of a false partnership return and conspiracy to commit those offenses.

OPINION BELOW.

The opinion of the Court of Appeals (V. 6, p. 1149)[1] is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on April 13, 1953 (V. 6, p. 1158). Petition for rehearing was denied on May 13, 1953 (V. 6, p. 1159) and the mandate of the Court of Appeals was stayed until June 13, 1953. On June 1, 1953, by order of Mr. Justice Douglas, the time within which to file this petition for a writ of certiorari was extended to and including July 13, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rule 37 (b) (2), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

1. Whether, in a tax evasion prosecution, the burden of proof is upon the defendant to establish accounts payable and receivable which were within the

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[1]The record consists of nine numbered volumes. References are designated by volume and page number.

knowledge of the prosecution, but not included by it in establishing the net worth of the defendant.

2. Whether there was a variance between the theory of the Government as shown in the indictment and as announced in its bill of particulars and the proof, the result of which was to convict the petitioners as to Count 13 of the indictment upon a charge for which they were not indicted, and for the defense of which they had no opportunity to prepare.

3. Whether the extrajudicial admissions of one defendant are sufficient to establish the falsity of a partnership tax return, upon a charge of filing such a false return.

STATUTES INVOLVED.

The applicable statutes are as follows:

United States Code, Title 18, Section 371 (formerly 18 U. S. C., Sec. 88, (1946 Ed.)).

> "§371. *Conspiracy to commit offense or to defraud United States.* If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both * * *"

United States Code, Title 26, Section 145(b).

> "§145(b). *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person

required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

United States Code, Title 26, Section 3809.

"§3809. *Verification of returns; penalties of perjury.*

(a) *Penalties.* Any person who willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than $2,000 or imprisoned not more than five years, or both."

STATEMENT.

Petitioners were defendants under an indictment containing thirteen counts (V. 1, p. 2) and upon trial before the United States District Court for the Southern District of California, Central Division, sitting without a jury, were convicted upon all excepts counts

11 and 12 (V. 1, p. 20). Of those upon which they were found guilty, nine charged income tax evasion (U. S. C., Title 26, Section 145 (b)); one charged the making of a false partnership return (U. S. C., Title 26, Section 3809); and one charged a conspiracy to commit such offenses (U.S.C., Title 18, Section 371). The judgment was affirmed by the United States Court of Appeals for the Ninth Circuit on April 13, 1953 (V. 1, p. 1158). Petition for rehearing was denied (V. 1, p. 1159).

At the trial the Government proved that in May, 1945, petitioners formed a partnership in Los Angeles, California, and conducted a commission business in wagering on horse-racing, operating under the name of "Golden News Service". In January 1949, the business was removed to Las Vegas, Nevada, where it was conducted under the name of "Flamingo Commissioners". It continued to operate until 1951. The partnership acted as a broker which received wagers from various persons called "bettors" which were "laid off" to persons known as "takers". Petitioners were thus the intermediaries who established the contact between the bettor and the taker. If the horse won, the taker would forward the amount won to petitioners who in turn would pay the winnings to the bettor. If the horse lost, the bettor would forward the amount wagered to petitioners who would then deduct a commission of from 2½% to 5% and forward the balance to the taker. Petitioners received no commission if the horse won.

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Count one (V. 1, p. 2) charged petitioners with conspiracy to defeat and evade income taxes for the years 1947 to 1949; counts two through ten charged that during 1945, 1946 and 1947 each petitioner attempted to evade his individual income tax and each aided and abetted the others in so doing. Counts eleven, twelve and thirteen charged that petitioners filed false partnership returns for 1947, 1948 and 1949. Petitioners were acquitted on counts eleven and twelve, and convicted on all other counts.

The Government experienced considerable difficulty in making proof of the amount of the income of petitioners for the years 1945, 1946 and 1947 to support counts one to ten of the indictment, and much of petitioners' and respondent's briefs in the Court of Appeals were devoted to the question of the sufficiency of the evidence to support counts one to ten. This question was not considered by the Court of Appeals in affirming the judgment, that Court holding "that the court properly found the appellants (petitioners) guilty of the charges upon count 13, and since the evidence was sufficient to sustain a conviction upon that count, and since the sentences imposed upon the other counts ran concurrently, it is not necessary to inquire as to the sufficiency of the evidence under the other counts" (V. 6, p. 1157). It would seem that the Court of Appeals recognized the fatal deficiencies in evidence to sustain the convictions upon Counts one to ten, supported, as it was, only by net worth statements which failed to give consideration to ac-

counts payable and accounts receivable known to the Government (V. 2, p. 240; V. 4, pp. 576, 584, 585, 620-623, 826, 827; V. 5, pp. 889-892, 895, 896, 898, 899-913, 918-923, 935-946, 948, 1012, 1015).

The proof relied upon to support Count 13: when petitioners moved to Nevada, they were subject to Nevada state tax upon their business. To ascertain the amount of tax due, periodic examinations were made of their records. The state auditor found that included in the record of the "bettors" was a combination or syndicate, designated on the records as "GN", having an interest in the syndicate of 45%. For the period covered by the records the gambling profits were $64,638.25 of which the share of "GN" was $29,060.75 (V. 2, pp. 144-150). No portion of this profit was included in the 1949 partnership return of petitioners. The Nevada state auditor testified that petitioner Cooke informed him that the "GN" reflected on the sheets was the Golden News Service and it was the trade name used by petitioners for their operations in California (V. 2, pp. 146, 147) but that he had no interest in the combination (V. 2, p. 187). While there was evidence that the Nevada partnership was the same which had done business in California,[2] the symbols "GN" stood for petitioners Goldbaum and Capri who were betting independently of the partnership (V. 2, p. 188). The evidence upon which petitioners were convicted upon counts one to ten was predicated upon net worth

[2]In fact, this was conceded by petitioners (V. 4, pp. 740, 741).

statements of the partnership (Exhibit 103, V. 7, p. 28) and of the individual petitioners (Exhibits 105, 106, 107, V. 7, p. 28). The nature of the business makes obvious the fact that large amounts of money were involved and that in most instances the result of the transactions was that accounts payable and receivable were outstanding at all times (V. 5, p. 936). The Government made no offort to ascertain the amounts owed to or by the partnership to other betting commissioners, although many of them and their records of account were examined by the Bureau agents (V. 2, p. 240; V. 4, pp. 576, 584, 585, 620-623, 826, 827; V. 5, pp. 889-892, 895, 896, 898, 899-913, 918-923, 935-946, 948, 1012, 1015). Even where evidences of partnership accounts receivable and payable were found, these were not included in the net worth statements of the partnership (V. 2, p. 240; V. 4, p. 576; V. 5, pp. 903, 904). Nor was effect given to other debts of the partnership (V. 4, p. 592; V. 5, pp. 905, 909).

ARGUMENT.

1. Petitioners' conviction upon Counts one to ten was upon alleged tax deficiencies sought to be established by the so-called "net worth" method, that is to say, that petitioners net worth had increased during the years in question in amounts greater than reported income for those periods. In establishing net worth the Government failed to give consideration

to accounts payable and receivable, known to Government agents. Further, the very nature of petitioners' business showed that moneys in bank were obviously held for transmission to "bettors" and "takers".

It was apparently the view of the Trial Court[3] that, in these circumstances, the Government's proof of net worth should stand subject to explanation by petitioners. A proper evaluation of the significance of this results in a rather surprising rule that the burden of proving his net worth shifts to the taxpayer.

Decisions of some Courts of Appeal[4] appear to misconstrue the effect of *United States v. Johnson*, 319 U.S. 503. These courts hold that where some discrepancies between the taxpayer's return and his actual income are indicated, the burden of proof is upon the taxpayer to make explanation. These are at odds with others[5] which hold that when the Government relies on increased net worth it must produce evidence that excludes all other possible available sources from which the additional funds could have been derived. This rule was limited in *Bell v. United States*, supra note 4, *Schuerman v. United States*, supra note 4, and *Brodella v. United States*, supra note

[3]The Court of Appeals did not pass upon this question.

[4]*Bell v. U.S.*, 185 F. 2d 302 (CCA 4); *Schuerman v. U.S.*, 174 F. 2d 397 (CCA 8); *Brodella v. U.S.*, 184 F. 2d 823 (CCA 6); *Graves v. U.S.*, 191 F. 2d 579 (CCA 10).

[5]*U.S. v. Fenwick*, 177 F. 2d 488 (CCA 7); *Bryan v. U.S.*, 175 F. 2d 223 (CCA 5); *U.S. v. Caserta*, 199 F. 2d 905 (CCA 3). See also *Chapman v. U.S.*, 168 F. 2d 997 (CCA 7); *U.S. v. Venuto*, 182 F. 2d 519 (CCA 3).

4, the courts there being of the view that the rule of *United States v. Fenwick,* supra note 5, and *Bryan v. United States,* supra note 5, would impose an "impossible burden of proof" upon the Government. But here the limitation has no application; here the Government agents had knowledge of accounts receivable and payable. In *Remmer v. United States* (CCA 9) decided May 28, 1953, the Court of Appeals questioned the "vitality" of the *Fenwick* case, supra note 5.

The effect of the decision of the Court of Appeals in the present case, agreeing as it does with the rule in the Fourth, Sixth, Eighth and Tenth Circuits, is in conflict with the pronouncements of the Third, Fifth and Seventh Circuits.

The holding here and in the Fourth, Sixth and Eighth Circuits disregards the presumption of innocence in holding that there is a duty on the part of a defendant to take the witness stand, or to call witnesses on his behalf, to explain a disparity between his reported income and such income as calculated by Government agents.

2. Count 13 of the indictment charged that the partnership return for 1949 was false in that "the return disclosed that the partnership had gross receipts * * * of $136,338.50, that the total assets at the beginning of the taxable year, 1949, were none, and that the total assets at the end of the taxable year, 1949, were none; whereas, in truth * * * the partnership had gross receipts * * * in the sum of at least $3,685,469.75, total assets at the beginning of

the taxable year, 1949, were at least $47,980.98, and total assets at the end of the taxable year, 1949, were at least $48,256.46". The bill of particulars furnished by the Government (V. 7, p. 56) stated merely that the gross receipts figure of $3,685,469.75 for 1949 alleged in count thirteen was derived from petitioners' books and records. The theory of the prosecution was that petitioners made return under "gross receipts" of only the gross commissions earned and not the total of the moneys passing through the business. However, at the trial, when it became apparent that the Court would not sustain the prosecution theory that petitioners were required to make return of all of the money received from "bettors" on behalf of the "takers" and vice versa (V. 2, p. 64),[6] the prosecution theory changed to cover a transaction entirely separate and distinct from its original position as disclosed by the indictment and bill of particulars—that is, petitioners had, in combination with others, engaged in betting on horses in April, 1949, and won $29,060.75 which was omitted from the partnership return.[7] When this change in theory became evident, petitioners' counsel objected thereto as constituting a prejudicial variance (V. 4, pp. 671-674).

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[6]During the trial and at its conclusion, the Trial Court clearly indicated that it did not believe that an offense was involved in the "gross receipts" or "assets" theory and acquitted on counts 11 and 12 (V. 5, p. 1109; V. 7, p. 136).

[7]The only evidence as to Cooke was his denial that he participated in the syndicate (V. 2, p. 187).

Nor was any reference made to this transaction in the Government's opening statement other than a vague reference to "gambling activities of the usual bookmaking sorts". (V. 2, p. 8).

That the transaction proved was a different one from that charged is obvious; that petitioners were taken by surprise and had no opportunity to refute the charge is likewise obvious. The present case falls clearly within the rule of *Berger v. United States,* 295 U.S. 78.

3. The offense of filing a false return lies primarily in its falsity. Count thirteen charged petitioners with filing a false partnership return. The proof that the unreported income was income of the petitioners' partnership consisted only of statements of petitioner Cooke that the symbol "GN" was the Golden News Service. Based upon this, the Trial Court attributed the gambling winnings of "GN" to petitioners as a partnership.

To justify conviction there must be proof exclusive of any express or implied extrajudicial admission of a defendant that the defendant falsified an income tax return. *United States v. Fenwick,* supra note 5; *Chapman v. United States,* supra note 5; *Gleckman v. United States,* 80 F. 2d 394 (CCA 8); *United States v. Miro,* 60 F. 2d 58 (CCA 2); *O'Brien v. United States,* 51 F. 2d 193 (CCA 7).

There was no *direct* proof that petitioners received partnership income not reported in their partnership return for 1949, nor was there circumstantial

evidence. The sole and only evidence that the gambling gains by the members of the syndicate designated "GN" was income of petitioners was the extrajudicial statement of the petitioner Cooke.

The conviction cannot stand since there was no proof of the *corpus delicti*, the existence of which cannot be presumed or established by an extrajudicial admission. The Government must, by *competent* evidence, prove beyond a reasonable doubt that the crime charged has actually been committed. *Pines v. United States*, 123 F. 2d 825 (CCA 8); *Forte v. United States*, 94 F. 2d 236 (CCA DC); *Gardner v. United States*, 261 F. 910 (CCA 9).

CONCLUSION.

For the reasons set forth, it is respectfully submitted that the petition for writ of certiorari should be granted.

Dated, Washington, D. C.,
June 24, 1953.

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Attorney for Petitioners.